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No. 03-860

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

J. MUNDY, J. EASTMAN, G. HART, and
CITY OF CARLSBAD POLICE DEPARTMENT,

Petitioners,

v.

MORGAN RHEAD,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Ninth Circuit's decision in this case impacts the vitality of *Heck v. Humphrey*, 512 U.S. 477 (1994), by requiring a court to deny summary judgment unless the moving party goes beyond a facially inconsistent conviction and civil claim and further proves the factual basis for the conviction. As the justification for this burden appears grounded in the possibility that a facially inconsistent conviction and civil claim might in fact be consistent under certain scenarios, the Ninth Circuit's decision effectively imposes a presumption of consistency that the moving party must overcome. Not only is such a presumption unwarranted, it becomes insurmountable in those contexts where factual findings are not required, such as a plea of guilty or nolo contendere[1] to a misdemeanor in California. The inevitable result of the Ninth Circuit's view is that a criminal defendant will wield significant power over a prospective civil defendant's *Heck* defense during a process in which the prospective civil defendant has no input.

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[1] Rhead contends in a footnote that it is questionable whether *Heck* should apply to a nolo contendere plea in light of California Penal Code section 1016, which prohibits such pleas from being used as admissions in a later civil suit. However, as Rhead himself acknowledges, *Nuño v. County of San Bernardino*, 58 F.Supp.2d 1127, 1135-1139 (C.D. Cal. 1999), squarely considered and rejected this contention. *Nuño* was undoubtedly correct on this point. Apart from the fact that nothing in the California statute suggests it is intended or able to supplant *Heck*, there is no conflict. *Heck* requires only an undisturbed conviction, not an admission of guilt.

ARGUMENT

A. THE BREADTH OF CALIFORNIA PENAL CODE SECTION 148(A) DOES NOT DIMINISH THE FACIAL INCONSISTENCY BETWEEN RHEAD'S CONVICTION AND HIS CIVIL CLAIM, AND DEMONSTRATES THE NEED FOR GUIDANCE REGARDING HOW FACIAL INCONSISTENCY IMPACTS THE PARTIES' BURDENS ON A *HECK* MOTION FOR SUMMARY JUDGMENT

Rhead's central attack upon the petition by Officers Mundy, Eastman, Hart and the City of Carlsbad Police Department (collectively "Officers") is that the "facial inconsistency" in the present case is illusory. Rhead bases this assertion on his claim that he was convicted under California Penal Code section 148(a) of "unlawfully obstruct[ing] a peace officer acting within the course and scope of his duties", not "resisting arrest".[2] In so doing, Rhead notes that California Penal Code section 148(a) is not strictly limited to the offense of "resisting

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[2] Rhead does not discernibly dispute the Officers' premise that a conviction for resisting or obstructing arrest in California ordinarily bars a later excessive force claim based on force exerted during the arrest. Rhead's only response is that any conviction for resisting or obstructing arrest in this case would still be consistent with his excessive force claim since he was arrested once the Officers found the marijuana, before the Officers used excessive force. Rhead's contention is a transparent effort to avail himself of the holding in *Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001). *Sanford* involved a scenario in which the officers used force on the convict claimant in a separate incident that occurred after the initial arrest and handcuffing. Rhead's *Sanford* theory is unsupported by any facts or allegations that Rhead was resisting or obstructing the Officers at the moment of the marijuana discovery. See, App. 6-7 (detailing Rhead's allegations). Thus, a conviction for resisting or obstructing arrest in the present case would bar Rhead's excessive force claim.

arrest". While this observation is true, it is also true that resisting or obstructing lawful arrest is a violation of California Penal Code section 148(a). Although Rhead's observation suggests a possible scenario of consistency, it adds no insight into how a court should resolve a situation in which the moving party has established a distinct risk of inconsistency between a conviction and a civil claim that cannot be conclusively established without proving the factual basis for the conviction.

A court facing the foregoing has but two practical options. First, the court may employ a tacit presumption of consistency in favor of the convict claimant and require the moving party to defeat any possibility of consistency by proving the factual basis for the conviction. Second, the court may acknowledge the facial inconsistency between the conviction and the civil claim and require the convict claimant to respond with evidence demonstrating that a trial on the civil claim is warranted because this unacceptable conflict will not develop. The Ninth Circuit chose the former approach. The Officers contend only the latter approach will protect the principles of *Heck* from distortion through craft.

1. *Heck* Does not Impose Upon the Moving Party an Initial Burden of Conclusively Demonstrating Inevitable Inconsistency Between a Conviction and a Civil Claim

Without extended analysis, Rhead contends *Heck* resolved the foregoing dilemma when it prohibited claims that "*necessarily* imply the invalidity of [the] conviction". *Heck*, *supra*, 512 U.S. at 487 (emphasis added). However, the word "imply" within the phrase comports with the conclusion that the inconsistency required to trigger *Heck* preclusion need not be established to a level of absolute

certainty at any point, much less during a moving party's initial showing on summary judgment. Further, the term "necessarily" cannot fairly be construed as the measure of the moving party's initial burden on summary judgment, nor can it be construed as intending a presumption of consistency in favor of convict claimants. If the moving party could demonstrate in the initial showing that a civil claim in fact "necessarily" implies the invalidity of the conviction, opposition to the motion would necessarily be futile.

Given the policies and rationale of *Heck* discussed in the Officers' petition, the better conclusion is that a moving party carries the initial burden on summary judgment by presenting a conviction that is facially, even if not conclusively, inconsistent with the civil claim. This conclusion is particularly appropriate where, as here, the convict claimant's own allegations set forth conduct constituting an offense that would necessarily be inconsistent with the claim. App. 6 (recounting allegations from paragraph 10 describing Rhead's struggles and attempted escape during arrest). In sum, while the objective of *Heck* is to preclude civil claims that "necessarily" imply the invalidity of a conviction, courts should be permitted within the summary judgment context to use concepts such as facial inconsistency to evaluate the relative risks of this outcome and require the convict claimant to assuage the court's legitimate concerns on this point.

2. The Evidence in the Record Does not Establish that Rhead's Conviction was Based Upon His Pre-Arrest Conduct Rather than His Conduct During the Arrest

Rather than directly grapple with the fundamental issues presented by the petition, Rhead downplays concerns about the Ninth Circuit's analytical errors by claiming that the record demonstrates his conviction arose from his pre-arrest conduct. Of course, a central flaw in the Ninth Circuit's rationale is that it relieved Rhead of the obligation to make any such showing. Furthermore, a reasoned review of the record lends no support to Rhead's claim, further counseling against extending an implicit presumption of consistency. For example, Rhead cites the criminal court's use of the word "obstruct" rather than "resist". Exhibit A to Opp., 3:4-9. However, the transcript nowhere indicates the criminal court consciously favored the word "obstruct" over the word "resist". Because the case law draws no meaningful distinction between these words in the context of a *Heck* analysis, the criminal court's statement provides no support for Rhead's position. *Susag v. City of Lake Forest*, 94 Cal.App.4th 1401, 1405-1406 (2002) (preclusive effect under *Heck* of conviction for "resisting or obstructing a peace officer"); *Nuño v. County of San Bernardino*, *supra*, 58 F.Supp.2d at 1132-1134 (obstruction under California Penal Code section 148(a) inconsistent under *Heck* with civil claim based on excessive force during arrest). Similarly, because it is beyond question that an officer's duties include lawful arrests, it is unreasonable to infer that the criminal court's use of the phrase "within the course and scope of his duties" was intended to exclude the Officers' acts of arresting and handcuffing Rhead.

Finally, contrary to Rhead's view, the prosecutor's statement that the charge under California Penal Code section 148(a) was a lesser included offense of the charge under California Penal Code section 69 supports the Officers' position. Exhibit A to Opp., 2:8-13. California Penal Code section 69 prohibits threats or use of violence against officers, not non-violent obstruction.[3] Under Rhead's own allegations, the only physical interaction between Rhead and the officers occurred during the arrest and handcuffing. App. 6-7 (detailing Rhead's allegations). Given the foregoing, it would be incredible to conclude that the prosecutor or criminal court considered Rhead's non-violent pre-arrest conduct as constituting a lesser included offense of a charge based on his violent conduct during the arrest, especially since Rhead's effort to avoid the preclusive effect of his conviction is premised upon his characterization of the pre-arrest and arrest incidents as legally distinct events.

The foregoing review of the record illustrates the import of properly assessing the parties' respective burdens under a *Heck* summary judgment motion. The absence of conclusive evidence regarding the factual basis for Rhead's conviction is not the product of the Officers' delinquency in presenting their defense, but the result of California Penal Code section 1192.5. The repercussions of the Ninth Circuit's pronouncement regarding the Officers' initial burden thus echo beyond the summary judgment context

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[3] California Penal Code section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable [as a felony]."

and foretell the ultimate demise of their *Heck* defense. The only conceivable way for the Officers to avail themselves of the *Heck* defense would be to "reenact" a criminal trial that never actually happened. Tellingly, Rhead does not acknowledge or attempt to justify these consequences of the Ninth Circuit's rationale.

If the loss of the *Heck* defense in this context could be traced to the Officers' own tactical decisions, this result might be accepted as tolerable. However, the Ninth Circuit's decision leaves prospective civil defendants' *Heck* defense in the hands of any criminal defendant offered a plea of guilty or nolo contendere to a misdemeanor charge. The absence of the prospective civil defendants from the plea context compounds the obvious mischief inherent in this process. Rather than allow a criminal defendant to thwart the application of *Heck* by eliminating or obfuscating the factual basis for a conviction, this Court should place the consequences of a limited factual basis for a conviction on the party best able to control this factor – the criminal defendant. The integrity of *Heck* demands no less.

B. THE PETITION PRESENTS ISSUES OF BROAD APPLICATION AND MERITS REVIEW

Contrary to Rhead's assertion, the petition presents issues worthy of review. The Ninth Circuit's decision and rationale irreconcilably conflicts with the principles and rationale of *Heck*. Further, the Ninth Circuit's analysis presents significant concerns that potentially apply to a broad class of cases. The nature of the moving party's initial burden on a *Heck* summary judgment motion is a fundamental inquiry applicable in

every case of facial inconsistency between a conviction and civil claim. This issue gains critical significance in jurisdictions such as California where factual findings are not necessary for nolo contendere pleas.

Smith v. City of Hemet, 356 F.3d 1138 (9th Cir. 2004), a decision by the same panel of the Ninth Circuit involved in this matter, does not undermine or vitiate the need for review in this case. In *Smith*, the majority found that a California Penal Code section 148(a) conviction, based on a guilty plea, barred the convict claimant's excessive force theory, consistent with the authorities cited in the Officers' petition. *Smith*, *supra*, 356 F.3d at 1141-1143. However, the majority did not explicitly analyze or resolve whether the moving party has an initial burden to prove the factual basis for the underlying conviction, the issue presented by this case. Indeed, the dissent challenged the majority's conclusion because it did not account for the lack of evidence regarding the factual basis for the conviction. *Smith*, *supra*, 356 F.3d at 1147. In short, *Smith* did not resolve the issues presented by this petition.

CONCLUSION

For the reasons addressed in this reply and the petition, the Officers respectfully request this Court grant certiorari to resolve the issues raised in the petition.

Respectfully submitted,

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